No. 84223-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL GERALD SNAPP,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

SUPPLEMENTAL BRIEF OF PETITIONER

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Jurisdictions

Constitutional Provisions

A. INTRODUCTION

Police officers stopped Daniel Snapp's car for a defective seatbelt, and arrested him after he told them he had a methamphetamine pipe under his seat. The officers were not worried about their safety and were not concerned that evidence could be destroyed. But they searched Mr. Snapp's car without a warrant, claiming it was "incident to his arrest."

This Court has held that a warrantless car search may not be justified by the search-incident-to-arrest exception unless (1) the arrestee is unsecured and within reaching distance of the passenger compartment, and (2) the search is necessary to ensure officer safety or prevent destruction of evidence of the crime of arrest. The Court of Appeals recognized that neither of these requirements was satisfied here, but it affirmed on the basis that searching the car for drugs "would help determine whether the pipe was drug paraphernalia."

The fact that performing an evidentiary search would help further an investigation does not justify performing the search without authority of law. If the officers had probable cause to believe drugs were in the car, the proper course of action was to obtain a warrant. This Court should follow its precedent and reverse.

B. ISSUE PRESENTED

Whether a police officer's warrantless search of a car violates article I, section 7 of the Washington Constitution when performed "incident to the arrest" of a person who is secured and unable to access a weapon or destroy evidence.

C. STATEMENT OF THE CASE

At approximately 8:00 a.m. on July 22, 2006, Washington State Trooper Keith Pigott was driving down 84th Street in Tacoma when he saw that the car driving next to him had air fresheners hanging from the rearview mirror. 10/3/07 RP 5, 22; State v. Snapp, 153 Wn. App. 485, 219 P.3d 971, review granted 231 P.3d 413 (2010). Trooper Pigott also noticed that "something was amiss" with the seatbelt the driver was wearing. 10/3/07 RP 5. He therefore signaled the car to stop. Snapp, 153 Wn. App. at 488. The driver, petitioner Daniel Snapp, pulled into a large parking lot at Silver Dollar Casino. Id.; 10/3/07 RP 7.

Trooper Pigott saw Mr. Snapp lean forward, and thought he might be hiding something under the seat. Id. Trooper Pigott noticed there was a female passenger, and called for backup. He then asked Mr. Snapp for his license and registration. When Mr. Snapp opened the glove compartment to retrieve the registration, Trooper Pigott saw a plastic bag with white powder he suspected was a controlled substance. Snapp, 153

Wn. App. at 489; 10/3/07 RP 8-10. Trooper Pigott also thought Mr. Snapp appeared restless and "fidgety". 10/3/07 RP 10.

Trooper Pigott asked Mr. Snapp to get out of the car, and Mr. Snapp complied. Trooper Pigott asked Mr. Snapp if he had any weapons, and Mr. Snapp showed him a knife he had. Trooper Pigott frisked Mr. Snapp, and found another knife. The officer then had Mr. Snapp perform field sobriety tests. Based on the tests, Trooper Pigott did not believe Mr. Snapp was impaired to the level requiring arrest for driving under the influence. Snapp, 153 Wn. App. at 489; 10/3/07 RP 11-12.

Trooper Pigott asked Mr. Snapp whether there were any drugs in the car. Mr. Snapp truthfully responded that there were no drugs, but that there was a methamphetamine pipe under the driver's seat. Trooper Pigott retrieved the pipe, and arrested Mr. Snapp "for the drug paraphernalia." In addition, a driver's license check revealed that Mr. Snapp's license was revoked and there was a warrant for his arrest. Snapp, 153 Wn. App. at 489; 10/3/07 RP 12-14. In the meantime, the other officer had arrived. He arrested the passenger for possession of marijuana in her purse, and placed her in his patrol car. 10/3/07 RP 14.

After both occupants were arrested, Trooper Pigott "searched the vehicle incident to arrest." 10/3/07 RP 14. He was looking for drugs, but did not find any. 10/3/07 RP 26. He did find an accordion folder and CD

case, both of which he opened to reveal identification cards and credit cards, which he concluded were evidence of identity theft. 10/3/07 RP 14-15; Snapp, 153 Wn. App. at 489. "The trooper was not looking for weapons, nor was he concerned that either item contained evidence that could be immediately destroyed." Snapp, 153 Wn. App. at 489-90.

Trooper Pigott then folded down the back seat of the car and observed a number of items in the hatchback. He aborted the search and obtained a search warrant for the trunk of the car. Snapp, 153 Wn. App. at 490; 10/3/07 RP 16.

Based on the items found during the warrantless search of the passenger compartment, the State charged Mr. Snapp with 21 counts of second-degree identity theft and one count of first-degree identity theft. CP 1-9.

Mr. Snapp moved to suppress the evidence obtained pursuant to the warrantless search. He argued both that the stop was unlawful and that the warrantless search of the car was unlawful. He argued that the search-incident-to-arrest exception to the warrant requirement "has become a complete fishing expedition in law enforcement." 10/3/07 RP 36. He emphasized that the exception is supposed to be "a very specific exception, that they can search for weapons or destructible evidence." Id. He pointed out that "even if [the officer] believes that he's searching the

car for methamphetamine ..., well, methamphetamine is not going away. It's not destructible evidence. It's going to sit there until he can get a search warrant to go through the car, and that's what he should have done; and instead, he chose not to." 10/3/07 RP 37.

The prosecutor argued the trooper was allowed to search the car without a warrant based on the bright-line rule of State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). 10/3/07 RP 39.

The trial court denied the suppression motion. The judge primarily analyzed the issue of the stop. As to the car search, the judge stated simply: "It turns out there's a warrant for Mr. Snapp's arrest, and things just snowballed from there; so the Court's going to deny the motion to suppress." 10/3/07 RP 42.

Mr. Snapp was convicted of six counts of second-degree identity theft, and appealed the denial of the suppression motion. CP 48, 59, 77.

The Court of Appeals affirmed the denial of the suppression motion. It held that because "Trooper Pigott could have reasonably suspected that Snapp had used drug paraphernalia," he was allowed to search the car for drugs without a warrant. Snapp, 153 Wn. App. at 496. "As proximity of the [pipe] to a controlled substance would help determine whether the pipe was drug paraphernalia, Trooper Pigott could search Snapp's vehicle for drugs." Id. at 496-97.

D. ARGUMENT

The warrantless search of Mr. Snapp's car violated article I, section 7 because Mr. Snapp had been arrested and was not able to access a weapon or destroy evidence.

a. Under *Patton* and *Buelna Valdez*, a warrantless car search is not justified under the search-incident-to-arrest exception unless the arrestee is unsecured and able to access a weapon or destroy evidence of the crime of arrest. Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. "Authority of law" means a warrant, subject to limited exceptions. State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). Exceptions to the warrant requirement must be "jealously and carefully drawn." State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). They "are not devices to undermine the warrant requirement." State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). "The State bears a heavy burden to show the search falls within one of the 'narrowly drawn' exceptions." Garvin, 166 Wn.2d at 250 (citation omitted).

The State cannot meet its burden here. The State acknowledged that Trooper Pigott did not obtain a warrant until after he had searched the entire passenger compartment of the car. But it argued the intrusion was constitutional under the "vehicle search incident to arrest" exception. The

State is wrong, because, as Mr. Snapp argued below, that exception is limited to situations in which the arrestee is within reaching distance of the car and could grab a weapon or destroy evidence of the crime of arrest before the officer could obtain a search warrant.

"[A]n automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed." State v. Patton, 167 Wn.2d 379, 384, 219 P.3d 651 (2009).

> After an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception.

State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

In other words, this Court has held that the vehicle search-incident-to-arrest exception to the warrant requirement applies only if two conditions are satisfied:

1) The arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; and

2) The search is necessary to ensure officer safety or prevent destruction of evidence of the crime of arrest.

Patton, 167 Wn.2d at 384.

Here, the State did not establish either of these preconditions, let alone both. The Court of Appeals recognized that the State did not meet either of these requirements: "The trooper was not looking for weapons, nor was he concerned that either item contained evidence that could be immediately destroyed." Snapp, 153 Wn. App. at 489-90. But the court wrongly ruled that Trooper Pigott's warrantless car search was constitutional anyway. It held the search was valid simply because Trooper Pigott arrested Mr. Snapp for use of drug paraphernalia, and searching for drugs in the car "would help determine whether the pipe was drug paraphernalia." Snapp, 153 Wn. App. at 496.

But the fact that performing an evidentiary search would help further an investigation does not justify performing the search without authority of law. If Trooper Pigott had probable cause to believe drugs were in the car, the proper course of action was to obtain a warrant.

> [T]he existence of probable cause, standing alone, does not justify a warrantless search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant.

State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (emphasis in original).

Clearly Trooper Pigott was capable of obtaining a warrant, because he decided to get one after viewing the contents of the trunk. The State

did not establish that it was somehow possible to obtain a warrant for the trunk but impracticable to obtain one for the passenger compartment. As Mr. Snapp pointed out in the trial court, if there had been methamphetamine in the car, it was not going to go anywhere while the officer sought a warrant. "It's going to sit there until he can get a search warrant to go through the car, and that's what he should have done." 10/3/07 RP 37.

Because Trooper Pigott searched the car without a warrant and no exception to the warrant requirement applied, the search violated article I, section 7 of the Washington Constitution. This Court should reverse Mr. Snapp's convictions and remand with instructions to suppress the evidence.

b. This Court should reject the invitation to adopt the *Thornton* exception in Washington. In the Court of Appeals, the State acknowledged that the search was unconstitutional but urged the court to adopt a "good faith" exception to the exclusionary rule.[1]

The Court of Appeals, however, did not accept the State's concession as to the invalidity of the search itself. Instead, it followed federal Fourth Amendment caselaw to hold that a warrantless car search is

[1] This Court subsequently reaffirmed that there is no such exception in Washington. State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010); State v. Adams, 169 Wn.2d 487, 238 P.3d 459 (2010).

permissible not only under the circumstances outlined in Patton and Buelna Valdez, but also when an officer has reason to believe evidence of the crime of arrest will be in the car. Snapp, 153 Wn. App. at 496-97. The court held this exception applies regardless of whether the arrestee was in a position to destroy the evidence before the officer could obtain a warrant. Id.[2]

This Court has never adopted this exception under article I, section 7, and should reject the invitation to do so now. The United States Supreme Court adopted the exception under the Fourth Amendment in Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1714, 173 L.Ed.2d 485 (2009). The genesis of the exception was Justice Scalia's concurring opinion in Thornton v. United States, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004). Gant, 129 S.Ct. at 1719. This "Thornton exception," in turn, was based on the outdated and expansive

[2] Notably, the same division of the Court of Appeals rejected this exception and followed Patton and Buelna Valdez in State v. Chesley, ___ Wn. App. ___, 239 P.3d 1160 (2010). There, although officers had reason to believe the car contained evidence of the crime of arrest, the Court of Appeals held the warrantless search was unconstitutional because it was "not necessary at the time of the search to preserve officer safety or prevent concealment or destruction of evidence of the crime of arrest." Id. at 1166. The same holding should apply to Mr. Snapp's case.

interpretation of the search-incident-to-arrest exception adopted in United States v. Rabinowitz, which was later overruled in Chimel[3]:

> If Belton searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested. This more general sort of evidence-gathering search is not without antecedent. For example, in United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), we upheld a search of the suspect's place of business after he was arrested there. We did not restrict the officers' search authority to "the area into which the arrestee might reach in order to grab an item," Chimel, 395 U.S. at 763, and we did not justify the search as a means to prevent concealment or destruction of evidence. Rather, we relied on a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested.

Thornton, 541 U.S. at 629 (Scalia, J., concurring in the judgment).

Justice Scalia acknowledged that this exception was "broader" than that approved in Chimel, and also conceded that "carried to its logical end, the broader rule is hard to reconcile with the influential case of Entick v. Carrington, 19 How. St. Tr. 1029, 1031, 1063-64 (C.P. 1765) (disapproving search of plaintiff's private papers under general warrant, despite arrest)." Thornton, 541 U.S. at 630-31 (Scalia, J., concurring in the judgment).

> But if we are going to continue to allow Belton searches on stare decisis grounds, we should at least be honest about why we are doing so. Belton cannot reasonably be explained as a mere

---

[3] Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

> application of Chimel. Rather, it is a return to the broader sort of search incident to arrest that we allowed before *Chimel*.

Id. at 631 (emphasis added). It is this "broader sort of search incident to arrest" exception that the U.S. Supreme Court adopted in Gant. 129 S.Ct. at 1719.

But exceptions to the warrant requirement are narrower under Washington's "authority of law" clause than under the Fourth Amendment. State v. O'Neill, 148 Wn.2d 564, 584-85, 62 P.3d 489 (2003). This Court rejected the expansive Rabinowitz interpretation of the search-incident-to-arrest exception decades ago. Citing Entick v. Carrington, which Justice Scalia acknowledged was at odds with the Thornton exception, this Court stated, "our state constitutional provision is declaratory of the common-law right of the citizen not to be subjected to search or seizure without a warrant." State v. Ringer, 100 Wn.2d 686, 691, 674 P.2d 1240 (1983) (citing Entick, 95 Eng.Rep. 807).

Indeed, while the Thornton exception is derived from the majority holding in Rabinowitz, this Court has repeatedly endorsed the dissent from that case, which lamented, "the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it." Ringer, 100 Wn.2d at 694

(quoting Rabinowitz, 339 U.S. at 79 (Frankfurter, J., dissenting)). See also Patton, 167 Wn.2d at 389-90.

> The [search-incident-to-arrest] exception began as a narrow rule intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee. This was the scope of the exception when Const. art. 1, § 7 was adopted.

Ringer, 100 Wn.2d at 698. Thus, in Washington, "the search incident to arrest exception must be narrowly applied, consistent with its common law origins allowing an arresting officer to search the person arrested and the area within his immediate control." Patton, 167 Wn.2d at 390 (citing Ringer, 167 Wn.2d at 699).

Several other states have rejected the Thornton exception under their state constitutions. For example, in Vermont, as here, "a warrantless automobile search based 'solely on the arrest of a person unable to endanger the police or destroy evidence cannot be justified under any exception to the warrant requirement and is unreasonable.'" State v. Bauder, 181 Vt. 392, 401, 924 A.2d 38 (Vt. 2007) (quoting State v. Eckel, 185 N.J. 523, 888 A.2d 1266, 1277 (N.J. 2003)). The Vermont Supreme Court declined to adopt Justice Scalia's additional exception:

> The so-called Belton variation endorsed by the dissent is just that, a variation of Belton. Although the rationale is different – the arrest purportedly provides the probable cause to search – the reasoning remains essentially the same, based on a perceived need to authorize routine warrantless searches absent any particularized showing that the delay attendant upon obtaining a warrant is

> impracticable under the circumstances. As earlier observed, however, such an approach is fundamentally at odds with Article 11 [of the Vermont Constitution], under which warrantless searches are presumptively unconstitutional absent a showing of specific, exigent circumstances justifying circumvention of the normal judicial process.

Bauder, 181 Vt. At 402-03. Other states also reject the Thornton exception, and require a warrant unless the arrestee is in a position to access a weapon or destroy evidence. See, e.g., Eckel, 185 N.J. at 541; Camacho v. State, 119 Nev. 395, 400, 75 P.3d 370 (Nev. 2003); State v. Roswell, 144 N.M. 371, 376, 188 P.3d 95 (N.M. 2008).

The Thornton exception is consistent with the Fourth Amendment's "automobile exception," under which a car may be searched based on probable cause alone even if there are no exigent circumstances. See United States v. Ross, 456 U.S. 798, 820-21, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). But like the states listed above, Washington does not have an "automobile exception." Rather, if officers have probable cause to believe a vehicle contains evidence of a crime, they must obtain a warrant unless exigent circumstances make waiting for a warrant impracticable. Tibbles, 169 Wn.2d at 371; State v. Patterson, 112 Wn.2d 731, 734-35, 774 P.2d 10 (1989); Ringer, 100 Wn.2d at 700-01. As the Nevada Supreme Court explained, the Thornton exception makes no sense in states like Washington that have rejected the automobile exception:

> In light of our prior decisions holding that under the Nevada Constitution police may not conduct a warrantless search of a vehicle, even if police may have probable cause to believe that contraband is located therein, absent exigent circumstances, it would be inconsistent to now hold that police may, without a warrant, search a vehicle incident to a lawful custodial arrest without exigent circumstances.

Camacho, 119 Nev. at 400. See also Roswell, 144 N.M. at 376, 378; State v. Peña Flores, 198 N.J. 6, 11, 965 A.2d 114 (N.J. 2009).

In sum, this Court set forth the proper rule under article I, section 7 in Patton and Buelna Valdez. A warrantless car search may not be justified under the search-incident-to-arrest exception unless the arrestee has access to the passenger compartment at the time of the search and could access a weapon or destroy evidence of the crime of arrest. Patton, 167 Wn.2d at 384; Buelna Valdez, 167 Wn.2d at 777. Neither of these exigencies existed in this case, so the warrantless car search violated article I, section 7. This Court should reverse Mr. Snapp's convictions and remand with instructions to suppress the evidence.

E. CONCLUSION

For the reasons set forth above, Mr. Snapp respectfully requests that this Court reverse his convictions and remand with instructions to suppress the evidence obtained pursuant to the unconstitutional search.

Respectfully submitted this 17th day of December, 2010.

Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Petitioner Daniel Snapp

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, v. DANIEL SNAPP, PETITIONER.	)	NO. 84223-0-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] STEPHEN TRINEN, DPA PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] STEPHEN HOBBS JAMES WHISMAN KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] RICHARD HANSEN COOPER DAVID OFFENBECHER ALLEN, HANSEN & MAYBROWN P.S. 600 UNIVERSITY ST STE 3020 SEATTLE WA 98101-4105	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SHERYL MCCLOUD ATTORNEY AT LAW 710 CHERRY ST. SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

[X] DANIEL SNAPP
801683
CEDAR CREEK CORRECTIONS CENTER
PO BOX 37
LITTLEROCK, WA 98556

( ) HAND DELIVERY
( ) _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2010.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711